

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
74002-S76LJ BY MEADOW LAKE)
DEVELOPMENT CORPORATION)

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision in this matter has expired. Two timely exceptions to the Proposal for Decision issued on November 15, 1991, were filed. One jointly by Objectors Loyal Chubb and Van Sherod, and the other exception jointly by Objectors Carol M. Ost and Dick-Char Corp. The Applicant Meadow Lake Development Corporation submitted a timely written response to the exceptions.

Both exceptions raise the issue as to whether the existing lining is adequate to satisfy the requirement that there be no leaking of water into or out of the pond. Both letters indicate the present liner, Bentimat, is inadequate. There is no dispute about the facts. The Applicant admits during the hearing before the Hearing Examiner and in his response to the exceptions that the present liner is inadequate.

The leakage of the pond and inadequacy of the present lining material, Bentimat, was considered by the Hearing Examiner (Finding of Fact 7, 20 and 21). The Findings further state the pond was constructed before the water use permit was granted, but because of the leakage of the pond the Applicant plans additional

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construction to eliminate seepage and inflow of Garnier Creek water into the pond. The Hearing Examiner considered the Applicant's offer at the hearing to have the lining designed by a professional engineer and approved by the Kalispell Regional Field Office Manager. The Applicant's plans for professional design and Department approval demonstrate substantial credible evidence that the means of diversion, construction and operation will be adequate. The Hearing Examiner includes the Applicant's plans as conditions in Items A and B of the Proposed Order, with which I concur. I concur as well to a further safeguard provided by the Hearing Examiner in Proposed Order, Item F, requiring additional measures if after construction it is found that the approved plan does not work.

I must clarify however, that the Hearing Examiner's proposed requirement that the method of prevention to be designed by a professional engineer include design consultation during construction and initial operation of the diversion to assure an adequate means of diversion and storage of the water from Garnier Creek. This includes the Applicant's engineer monitoring the installation of the lining material to assure that the design is followed, the original design assumptions are yet satisfactory, and proper changes in construction techniques and materials are made if necessary. Also the engineer prepare operation and maintenance instructions to assure the continued integrity of the lining material in the storage pond during its use. This will be imposed by this Order.

With the Findings and conditions imposed in the Proposed Order and with the clarification above, I conclude that there is substantial credible evidence that the proposed means of diversion, construction, and operation of the diversion works are adequate.

Objectors Ost and Dick-Char Corp raise an additional point in their joint exception concerning the adequacy of the proposed means of diversion. They contend that the previous operational history for the same diversion system for other water rights held by the Applicant is relevant evidence to be considered by the Hearing Examiner.

This issue was raised by the Objectors at the hearing and is addressed by the Hearing Examiner in paragraphs 2 and 3 of Proposed Conclusion of Law 8. The proposed means of diversion and operation appear from the evidence to be reasonable and similar to other diversion operations on Garnier Creek. Alleged noncompliance by the Applicant on other water use permits is not relevant in this proceeding and I concur with the Hearing Examiner's Proposed Conclusion of Law 8. If exception is directed to the credibility of the Applicant to carry out the conditions for additional construction, then the demeanor and truthfulness of the Applicant is relevant but can only be fairly judged by the Hearing Examiner and will not be overturned by my review.

Assuring that the construction and operation of the diversion is as proposed is important and vital to existing water

rights on Garnier Creek but the Hearing Examiner concludes appropriately that the issue is enforcement. Clearly, if the proposed diversion system is operated for a time outside the proposed period of appropriation or is not constructed properly, the permit can be modified or revoked. Although the Department's powers to modify or revoke a water use permit exist without conditioning this permit, Proposed Order Item F, the condition as proposed is accepted as further notice and clarification to the parties in this matter.

Objectors Chubb and Sherod maintain that there are not unappropriated waters in the source of supply, Garnier Creek. They assert in the exception the current water rights claims exceed Garnier Creek flows.

From the exception there appears to be some confusion about the proposed period of diversion and periods when water shortages have occurred on Garnier Creek. The period of diversion of water from Garnier Creek to the pond is to be from March 15 to May 15 of each year. Use of the water during the irrigation season would be from the sealed pond from April 1, through October 31, of each year. Of course when the pond is drained after May 15, no other waters from Garnier Creek could be diverted into the storage pond under this permit. The evidence is accurately reflected in the Proposed Findings 16-21 that water is reasonably available during the proposed period of diversion of March 15 to May 15. The Hearing Examiner properly evaluated the evidence and

finds that water shortages occur later during the irrigation season but outside the period of the proposed diversion.

The exception by Objectors Chubb and Sherod maintains that the Applicant did not submit independent hydrologic or other evidence demonstrating the criteria are met. They assert that the permit cannot be conditioned so as to meet the criteria.

From my review of the evidence and Proposed Findings there is sufficient independent hydrologic and other evidence demonstrating that the criteria are met and I concur with the Hearing Examiner's Proposed Conclusions of Law 7 through 11. The independent evidence is described in the Proposed Findings of Fact and includes U.S. Geological maps, Water Resources Survey maps, water measurements by Rich Russell, photographs, and affidavits of individuals observing the creek flows. The means of diversion, construction, and operation is required to be designed by a professional engineer and approved by the Field Manager of the Department's Regional Office each independently assuring that the appropriation works are adequate.

The Department of Natural Resources and Conservation accepts and adopts the Proposed Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the November 15, 1991, Proposal for Decision together with the clarification made herein, and incorporates them herein by reference. Based upon the said Findings of Fact, Conclusions of Law, all files and records herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 74002-s76LJ is hereby granted to Meadow Lake Development Corporation to appropriate 100 gallons per minute up to 6 acre-feet per year of water from Garnier Creek for irrigation of 137 acres of golf course. The means of diversion shall be a headgate with ditch or pipeline tapping Garnier Creek in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, Township 30 North, Range 20 West, Flathead County, Montana. Water shall be stored in an off-source reservoir in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 6 with a capacity of 3 acre-feet. The proposed place of use is specifically described as 9 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, 10 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 14 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, 14 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, 26 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, 28 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, 13 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, and 23 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 6. The period of diversion from the source into the storage reservoir shall be March 15 through May 15 of each year. The period of use of water from storage for irrigation shall be April 1 through October 31 of each year. The priority date shall be 8:45 a.m. February 23, 1990.

A. The Permittee shall prevent the inflow of subsurface Garnier Creek water into the pond. A plan that assures an adequate means of diversion and storage of the water from Garnier Creek shall be prepared by a professional engineer. The plan shall include an initial design as well as a plan for design consultation during construction and initial operation of the

diversion. The Applicant's engineer is required to monitor the installation of the lining material to assure that the design is followed, the original design assumptions are yet satisfactory, and proper changes in construction techniques and materials are made if necessary. Also the plan shall include operation and maintenance instructions to assure the continued integrity of the lining material in the storage pond during its use. The plans for the method shall be presented to the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation for approval. The Permittee shall submit copies of the plan to the Objectors in this proceeding and the Department shall consider the Objectors' comments prior to approval.

B. Prior to diverting water from Garnier Creek into the pond, Permittee must permanently prevent or obstruct the flow of water into the pond through the existing rusted pipe. Prior to diversion of water into the pond from Garnier Creek, Permittee must obtain confirmation of compliance with this condition from the Kalispell Water Resources Regional Office.

C. Permittee shall install adequate flow metering devices on the diversion into the storage pond and on any diversion or outflow devices that take or release water from the pond in order to allow the flow rate and volume of water diverted and used or released to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, used, or released including the period of time, and shall submit said

records to the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation upon demand and by November 30 of each year.

D. This Permit is supplemental to Statement of Claim 76LJ-W131493-00, and Permits to Appropriate Water P8080-g76LJ, P26716-g76LJ, P26723-s76LJ, and P71015-g76LJ which means they have overlapping places of use. The combined total volume diverted each year under these appropriations must not exceed the amount necessary for the permitted beneficial use.

E. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any prior appropriator.

F. If, at any time after this Permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right or that Permittee is not operating in substantial accordance with the terms and conditions of this Permit, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the Permit should not be modified or revoked. The Department may then modify or revoke the Permit to protect existing water rights or allow the Permit to continue unchanged if the hearings officer determines that no existing

water rights are being adversely affected or the Permittee has been operating in substantial accordance with the terms of the Permit.

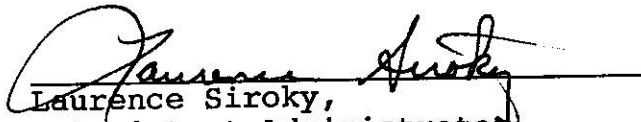
G. Issuance of this Permit shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

H. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 20 day of February, 1992.


Laurence Siroky,
Assistant Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 20th day of February, 1992 as follows:

Meadow Lake Development Corp.
1415 Tamarack Lane
Columbia Falls, MT 59912

Joe Warner
Judie Warner
731 Halfmoon Road
Whitefish, MT 59937

Russell Warner
Jeanne Warner
810 Halfmoon Road
Whitefish, MT 59937

Van Sherod
2429 Second Avenue West
Seattle, WA 98119

Loyal Chubb
Patricia Chubb
231 Chubb Lane
Columbia Falls, MT 59912

Richard R. Coverdell
Clairice C. Coverdell
995 Walsh Road
Columbia Falls, MT 59912

John E. Stults, Hearing
Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301

Michael P. Davis
Margaret S. Davis
480 So. Hilltop Road
Columbia Falls, MT 59912

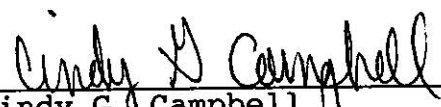
Dick-Char Corporation
6105 Hwy 2 West
Columbia Falls, MT 59912

Carol M. Ost
Debora Loucks
280 N. Hilltop Road
Columbia Falls, MT 59912

James W. Emerson
Dixie Emerson
1010 Conn Road
Columbia Falls, MT 59912

Len Patterson
Cindy Patterson
1588 E. Edgewood Drive
Whitefish, MT 59937

Charles F. Brasen, Manager
Kalispell Water Resources
Regional Office
P.O. Box 860
Kalispell, MT 59903
(Via E-Mail)


Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	
NO. 74002-s76LJ BY MEADOW LAKE)	PROPOSAL FOR
DEVELOPMENT CORPORATION)	DECISION

* * * * *

Pursuant to §§ 85-2-121 and 85-2-309, MCA, a hearing was held in the above matter on August 7, 1991, in Columbia Falls, Montana, to determine whether the above Application should be granted to Meadow Lake Development Corporation under the criteria in § 85-2-311(1), MCA.

APPEARANCES

Applicant appeared at the hearing by and through Peter Tracy, President of Meadow Lake Development Corporation.

Objectors Joe and Judie Warner appeared at the hearing by and through Judie Warner. Objectors Russell and Jeanne Warner appeared at the hearing by and through Jeanne Warner. Objectors Carol Ost and Debora Loucks appeared at the hearing by and through Carol Ost. Objectors James W. and Dixie Emerson appeared at the hearing by and through Dixie Emerson. Objectors Len and Cindy Patterson appeared at the hearing by and through Cindy Patterson. Objectors Richard R. and Clairice C. Coverdell appeared at the hearing by and through Clairice C. Coverdell. Objectors Loyal and Patricia Chubb appeared at the hearing by and through Loyal Chubb. Objector Dick-Char Corporation appeared at the hearing by and through Dick Sapa, President. Objector Loyal

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Chubb, by prearrangement with the Hearing Examiner, appeared at the hearing as spokesperson for Objector Van Sherod. Lynn Venteicher, area resident and property owner, appeared at the hearing as witness for Objectors Chubb and Sherod.

Appearing at the hearing as staff spokesperson for the Department of Natural Resources and Conservation (Department) was Chuck Brasen, Manager of the Department's Kalispell Water Resources Regional Office. Appearing at the hearing as Department staff witness was Rich Russell, Water Resources Specialist in the Department's Kalispell Water Resources Regional Office.

Objectors Michael P. and Margaret S. Davis did not appear at the hearing, but had notified the Hearing Examiner on July 25, 1991, they could not. Objectors Davis were excused on the record at the hearing and remain parties in this matter.

Objector Richard P. Walsh and Objector George C. Butzlaff did not appear at the hearing and did not make prior arrangements with the Hearing Examiner. The Hearing Examiner ruled at the hearing Objectors Walsh and Butzlaff were in default and their objections be stricken. That ruling is hereby confirmed. The objections of the defaulted objectors are stricken and said objectors are no longer parties in this matter. Mont. Admin. R. 36.12.208 (1984).

EXHIBITS

Objector Dick-Char Corp. offered the following exhibit which was accepted into the record without objection.

Dick-Char Exhibit 1 consists of three pages and a business card, all stapled together. The business card is one of Chuck Brasen's on which is written in pencil, "Per Your 7-25-90 Telcon Request". The three pages are photocopies of pages from a Department computer printout entitled, "Water Right Listing by Source Name by Priority Date". The listings for Garnier Creek and Trumbull Creek are outlined in green highlighter ink. All three sheets have notations on them in pencil which appear to be mostly phone numbers.

Objectors Chubb offered the following exhibit which was accepted into the record without objection.

Chubb Exhibit 1 consists of nine pages. Page one is a photocopy of a completed form entitled "State of Montana Natural Streambed and Land Preservation Act Notice of Proposed Project." Page two is photocopy of a hand-drawn map of the north pond and proposed pond at Meadow Lake. Page three is a photocopy of a completed Montana Department of Fish & Game form entitled "Natural Streambed and Land Preservation Act Department Inspection Form." Page four is a photocopy of a February 20, 1990, letter from Barbara M. Riley, Meadow Lake Golf & Ski Resort Office and Property Manager, to a Ms. Jones. Page five is a photocopy of "Flathead Conservation District for the State of Montana Natural Streambed and Land Preservation Act, Board's Decision" on Application #FL-11-90 without the applicant's signature. Pages six and seven are a photocopy of a March 7, 1990, letter from Cathy M. Jones, Flathead Conservation District Resource

Conservationist, to Peter Tracey [sic]. Page eight is a photocopy of a completed Montana Department of Fish & Game form entitled, "Natural Streambed and Land Preservation Act Department Decision Form." Page nine is a photocopy of "Flathead Conservation District for the State of Montana Natural Streambed and Land Preservation Act, Board's Decision" on Application #FL-11-90 with the applicant's signature.

Objectors Chubb and Sherod jointly requested that the record be held open for them to submit a copy of a pending report on Applicant's water rights by Dave Schmidt, Water Resources Specialist in the Department's Kalispell Water Resources Regional Office. Applicant objected to the request on grounds that the report would be focusing on existing rights and not be relevant to the present application. The Hearing Examiner determined by questioning Rich Russell that the report would contain data on flow rate measurements taken in Garnier Creek, and therefore overruled Applicant's objection. The record was held open for submission of the entire report provided Objectors Chubb and Sherod identified the specific passages they wished the Hearing Examiner to consider. The record was also held open for response to the report by Applicant. The report and response were timely submitted, and materials in the report are relevant to the present application, therefore the report is accepted into the record as Chubb-Sherod Exhibit 1.

Chubb-Sherod Exhibit 1 consists of a photocopy of an eight page report titled, "Meadow Lake Golf Course: A History of

Incremental Development As It Affects Water Use & Water Users", dated August 23, 1991, and 45 pages of supporting materials. The parts specifically identified by Objectors Chubb and Sherod for consideration by the Hearing Examiner are paragraphs 9, 16, 20, and Conclusions and Recommendations of the eight page report. The Hearing Examiner also takes notice of the following supporting documents: 1) General Land Office Plat showing Section 6, Township 30 North, Range 20 West, Principal Meridian Montana; 2) the map entitled "Meadow Lake Water Use Map" dated July 31, 1991; 3) the page of discharge measurement notes for the May 7, 1991, measurements of flows in Garnier Creek; and 4) the design plan titled "Van Sherod Garnier Creek Diversion."

Applicant and Objectors had opportunity prior to the hearing to review the Department's file on this application. The Hearing Examiner indicated at the beginning of the hearing the Department's file would be part of the record. No objection to the file or any portion of it was expressed; therefore the entire Department's file is a part of the record.

At the hearing, Hearing Examiner stated that he would take official notice of the Department's water rights records for Garnier Creek and Trumbull Creek. No objection was expressed by any party.

In the course of reaching a decision in this matter, the Hearing Examiner took notice of additional materials. When addressing the channels of Garnier Creek, the Hearing Examiner took notice of USGS Topographic Map Columbia Falls North, Mont.,

and the 1965 Water Resources Survey conducted by the Montana State Engineer's Office, the predecessor to the present Department. In determining period of use of water from storage for irrigation, the Hearing Examiner took notice of the Soil Conservation Service *Montana Irrigation Guide*, page 4-19, and the Department's Climatic Area Map, 1987.

PRELIMINARY MATTERS

I. At the hearing, Objectors requested the record be left open for submission of a Department staff report on Applicant's water rights which Objectors knew was soon to be completed. Overruling an objection by Applicant, the Hearing Examiner held the record open until August 25, 1991, to allow Objectors Chubb and Sherod to submit a copy of the report for consideration of specific sections to be identified by Objectors Chubb and Sherod, and until September 7, 1991, solely for Applicant's response to the report. The report was accepted into the record as Chubb-Sherod Exhibit 1.

In their cover letter with the submission of the report, Objectors Chubb and Sherod requested that the record in this matter remain open until a spring 1992 measurement can be taken to determine approximately what amount of water comprises 40% of Garnier Creek. Applicant responded it had no objection so long as it would be allowed to fill the pond from the creek in the spring of 1992, otherwise it opposes keeping the record open beyond the date established at the hearing. Applicant notes it has submitted what it determines to be adequate evidence to

support its application. Two questions must be answered in order to grant Objectors' request with Applicant's condition. The first question to be answered with regard to this request and response is whether Objectors' request itself is proper regardless of Applicant's response. The second question is whether Applicant's condition is allowable, thus allowing Objectors' request, if proper, to be granted without opposition. The second question will be discussed and answered first.

Applicant does not presently have a water right to fill the new pond from Garnier Creek because all of its water rights indicate storage in only the two other ponds it has or the old sewage lagoons; and if the record in this matter were held open as Objectors Chubb and Sherod request, no new permit to appropriate would have been issued to Applicant by spring of 1992 to fill the pond. Administrative Rule of Montana 36.12.104 provides for issuance of an interim permit to allow a person to immediately appropriate water for testing purposes. Neither Applicant nor Objectors Chubb and Sherod indicate that filling Applicant's pond next spring would provide information necessary to make a decision in this matter. The Hearing Examiner cannot see that filling the pond on a trial basis would provide information necessary to determine whether this Application meets the statutory criteria. Thus, there does not appear to be justification for issuance of an interim permit to fill the pond in the spring of 1992. Without a permit a person cannot legally appropriate water in Montana. Mont. Code Ann. §§ 85-2-122 and 302 (1989).

Since Applicant has no water rights to fill the pond, since there is no justification for issuing Applicant an interim permit to fill the pond, and since holding the record open precludes issuance of the permit applied for herein, there is no way the record can be held open and Applicant can also legally fill the pond. Therefore, since Applicant's condition for agreeing to Objectors' request cannot be met, Applicant opposes Objectors' request.

This leaves us with the first question posed above, i.e., is Objectors' request proper, regardless of Applicant's condition and opposition. Public notification of this Application was published and mailed to individuals in early July 1990. Notice of the hearing was given sixty days prior to the hearing date. No requests for continuance were received by the Hearing Examiner. From its statements in response to Objectors' request, Applicant implies it had adequate time to prepare for the hearing.

Objectors had ample time to take measurements of Garnier Creek, including spring flow measurements, prior to the hearing. Objectors also had ample time to consult with the author of the report to determine whether the measurements in the report were sufficient to their purposes. Furthermore, one of the Department staff members who took the measurements, Rich Russell, was available for questioning at the hearing and was asked questions by the Examiner about the timing of the Department's

measurements, but Objectors asked no questions relating to the issue of concern to them.

The fact that the information in the report does not meet Objectors' purpose to the extent they had hoped it would is not sufficient cause to order the record to remain open, especially in light of the opportunities Objectors had to know whether the report would fulfill their purpose and to independently obtain the data they now wish they had. See generally Mont. Code Ann. § 2-4-703 (1989). Objectors' request to keep the record open is denied.

II. The USGS Topographic Map Columbia Falls North, Mont., shows Garnier Creek as a single channel flowing south through roughly the center of Section 31, Township 31 North, Range 20 West, and Section 6, Township 30 North, Range 20 West, then meandering through the NW $\frac{1}{4}$ of Section 7, Township 30 North, Range 20 West, where it is joined by the only significant tributary prior to its confluence with Trumbull Creek. The map shows this principal tributary as having been formed by three feeder tributaries. One of these feeders is shown as beginning in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6, flowing south-southwest through the NW $\frac{1}{4}$ of Section 6, then crossing into Section 1, Township 30 North, Range 21 West, where it eventually joins the aforementioned principal tributary. Uncontradicted testimony by Loyal Chubb and Lynn Venteicher, and Chubb-Sherod Exhibit 1, establish that this tributary is not distinct, but is actually a branch of the flow of Garnier Creek, and that, furthermore, it was historically the

natural channel of Garnier Creek. This is confirmed by the June 22, 1891, General Land Office plat of the original cadastral survey of Township 30 North, Range 21 West, and by the 1965 Water Resources Survey conducted by the Montana State Engineer's Office, the predecessor to the present Department. There is also, however, a Notice of Appropriation of Water Right filed in 1919 that calls the portion of the stream in Section 30, Township 31 North, Range 20 West, Cedar Creek and identifies the place of use as in the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 6, Township 30 North, Range 20 West.

The portion of Garnier Creek that flows through Applicant's property in the SW $\frac{1}{4}$ of said Section 6 is said to be a combination of a ditch called the Larkin Ditch and a natural drainage called Lost Creek. This too is confirmed by the General Land Office plat and the 1965 Water Resources Survey.

The present division of the flow into two branches is in the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 31, Township 31 North, Range 20 West, where there are the remains of an old wooden splitter box. Division of water between the two branches must be controlled presently with rocks and boards because the splitter box does not function. Historically the division of flow between the two branches has been forty percent to the east branch and sixty percent to the west branch. There is no mention of this division of flows in the Department's records of water rights on Garnier Creek. None of the water rights on record with the Department that name Garnier Creek as a source identify the splitting of the two

branches as a point of diversion. (Department's file and Department's records and testimony of Loyal Chubb and Lynn Venteicher)

A reinforced concrete structure is planned for installation to replace the existing wooden splitter box. The design of the planned structure does not include control devices to vary the amount of flow that can be sent down either of the two branches of Garnier Creek. It appears to be designed simply to reestablish a device that reliably splits the flows in Garnier Creek so that forty percent goes east and sixty percent goes west.

Objector Sherod also anticipates installation of a permanent flow-dividing structure will stop the frequent trespassers who enter his property to control the division of flows by moving the rocks and boards. (Chubb-Sherod Exhibit 1 and Department's records and testimony of Lynn Venteicher and Loyal Chubb)

Naming and administering both branches as parts of Garnier Creek has been the accepted convention for the present and recent past management of this creek system. Claims filed in the statewide adjudication of water rights for rights to water in Garnier Creek name the east branch as Garnier Creek and the west branch as Garnier Creek. Recent permits to appropriate water from either branch call them both Garnier Creek, as do recent changes to existing water rights. Objections filed against previous applications on these channels have not stated concerns about the naming of the branches; neither have they stated concerns about whether the point at which the branches fork off from each other should be a point of diversion rather than the

point at which an appropriator controls the diversion. (Department's records)

While it may be true that the historical names and flows in these channels may have been different than they are today, the present system of channelization and appropriation treats the two branches of Garnier Creek as branches of the same drainage. Therefore, the application properly names the proposed source as Garnier Creek and properly identifies the legal land description of the proposed point of diversion as the point where the water will be diverted from the east branch of Garnier Creek by a controllable diversion structure.

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit No. 74002-s76LJ was filed with the Department on February 23, 1990, at 8:45 a.m. (Department's file)

2. Applicant proposes to appropriate 100 gallons per minute (gpm) up to 6 acre-feet (AF) per year of water from Garnier Creek for irrigation of 137 acres of golf course. The means of diversion would be a headgate with ditch or pipeline tapping Garnier Creek in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, Township 30 North, Range 20 West, Flathead County, Montana. Water would be stored in an off-source reservoir in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6 with a capacity of 6 acre-feet. The proposed place of use is specifically described as 9 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, 10 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 14 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, 14 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, 26 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, 28 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, 13 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, and 23 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$

of Section 6. The period of diversion from the source into the storage reservoir would be March 15 through May 15 of each year. (Department's file)

3. The proposed period of use of the water from storage for irrigation was stated as March 15 through May 15 of each year in the public notice published in the newspaper, in the notices sent to individuals and agencies, and in the June 7, 1991, Notice of Hearing. The application form and addendum (Forms 600 and 600A), however, contain statements indicating that the water would be used during times of low stream flows in Garnier Creek and that the use is intended in part to try to alleviate pressures on those low flows thus allowing more water to be available to other water right owners. Statements by Applicant at the hearing corroborate the statements on the forms.

Testimony at the hearing indicates that low flows in Garnier Creek are typically outside the period from March 15 through May 15 (see Findings of Fact 17, 18, 19, and 21, below). Thus Applicant's proposed use of the stored water would not be confined to the same period as when the water would be diverted from the source. Therefore, the period of use of the stored water for irrigation is likely to be at any time during the standard irrigation season. The standard irrigation season for the climatic area and specific purpose of the proposed use is April through October of each year. (Department's file, Department's Climatic Area Map, Montana Irrigation Guide, and testimony of Peter Tracy)

4. Pertinent portions of the Application were published in the Daily Inter Lake, a newspaper of general circulation in the area of the proposed source, on July 11, 1990. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. (Department's file)

5. The Department received twelve objections filed against this Application. Two of the objections were subsequently stricken (see page two).

The principal allegation stated as basis for these objections is that there is insufficient water available in Garnier Creek and Trumbull Creek to allow the proposed appropriation. Other points raised by Objectors on their objection forms are that existing water rights will be adversely affected, and that the proposed appropriation will be unadministrable. (Department's file)

6. An excavated pit exists that would be Applicant's proposed pond. It was dug late in 1990, and is located as represented in the application materials submitted by Applicant. The pit is, on average, approximately forty yards wide, sixty-five yards long, and twelve feet deep. The surface area can be calculated to be approximately one-half acre, i.e., $[(3 \text{ ft.} \times 40 \text{ yds.}) \times (3 \text{ ft.} \times 65 \text{ yds.})] / 43560 \text{ sq. ft. per acre}$. The capacity can be calculated to be approximately three AF, i.e. 0.5 acre x 12 feet x 0.5. (Testimony of Peter Tracy and general technical knowledge)

7. The pit was dug in part to create the proposed pond but also to provide fill for Applicant's driving range which was a swamp. It has some water in it and there is lining material, called "Bentimat", in it about ten to twelve feet down the sides of the pit. The water in the pit is from groundwater seepage from the shallow groundwater in the strata in which the pit was dug. The existing lining material has not stopped the seepage of groundwater into the pit. It is possible extending the lining material to cover the bottom of the pit as well as the sides would stop the seepage.

Applicant is prepared to install whatever is needed to seal the pit and eliminate the seepage. Specifically, Applicant agrees to the placing of the following condition, suggested by Chuck Brasen, on any permit that may be issued for the proposed appropriation:

The Permittee shall prevent the inflow of subsurface Garnier Creek water into the pond. The method of prevention shall be designed by a professional engineer. The plans for the method shall be presented to the Kalispell Regional Office for approval.

The plans must detail how the method recommended will prevent subsurface Garnier Creek flows into the pond adjacent to and upstream of the pond. The plans must be approved by the Kalispell Regional Office Manager prior to diversion of water into the pond from Garnier Creek.

(Department's file and testimony of Peter Tracy and Rich Russell)

8. When excavating the pit, Applicant uncovered an existing, buried, rusted pipe that appears to come from Garnier Creek and is leaking two to three gpm of water into the pit. The pipe is not a part of any of Applicant's diversion and conveyance

systems under its existing water rights and permits. Applicant has made one unsuccessful attempt to stop the flow from this pipe by trying to plug it with cement. Applicant wants to plug that pipe and believes it should be plugged for the operation of the pond to be properly controllable. (Testimony of Peter Tracy)

9. The proposed appropriation into the pond is intended to provide additional storage water for use through Applicant's irrigation system for irrigation of Meadow Lake Golf Course thereby lessening the threat to the viability of the golf course posed by periods of drought. Applicant would have used the additional water made available to its overall irrigation needs by this appropriation during very dry periods in two years since 1975. (Testimony of Peter Tracy)

10. Applicant owns the ground over which the east branch of Garnier Creek flows at the proposed point of diversion and also owns the ground on which the holding pond exists. It is Applicant's uncontested representation that it has possessory interest or written consent of the person with possessory interest in the property that is the proposed place of use. (Department's file and testimony of Peter Tracy)

11. Water would be diverted from Garnier Creek at the point of diversion by means of an existing headgate which has a capacity of 300 gpm and which can be controlled to govern the flow or stop the flow of Garnier Creek water into the conveyance system. Water would be conveyed from the diversion structure to the pond by means of an existing six-inch plastic pipeline on a gentle

grade of less than five percent. The headgate and pipeline have been used in the past to divert and convey water appropriated from Garnier Creek under another of Applicant's water rights to other ponds on Applicant's property. (Department's file and testimony of Peter Tracy)

12. The existing pit that is proposed for use as the pond under this appropriation is connected to a system of ponds that Applicant has for irrigating the golf course under other water rights. The connection already exists by means of an eight-inch plastic pipeline with a valve on it that can be completely closed. There is a secondary connection by means of a standpipe for draining overflow in the upper pond into the lower pond. There is no valve on the standpipe connection. (Department file and testimony of Peter Tracy)

13. Applicant has an existing sprinkler irrigation system that distributes water over the area of the proposed place of use. The system has been operated under water rights and permits already owned by or issued to Applicant. (Department's file, Department's records, and testimony of Peter Tracy)

14. Although it is not clear from the record exactly what amount of water was appropriated, or how and when, some of the questioning and answers indicate that water has been diverted from Garnier Creek into the existing pit. For example, Peter Tracy asked Objectors whether they had been adversely affected by diversions this past spring. Furthermore according to Loyal

Chubb, Objector Sherod contends it was wrong for Applicant to have dug the pit prior to obtaining a water use permit.

15. Applicant has other appropriations for the purpose of irrigating the Meadow Lake Golf Course which is the proposed place of use: Statement of Claim 76LJ-W131493-00; and Permits to Appropriate Water P8080-g76LJ for 45 gpm from a well, P26716-g76LJ for 35 gpm from a well, and P26723-s76LJ for 560 gpm from Garnier Creek. Permit to Appropriate Water P71015-g76LJ is owned by Meadow Lake County Water and Sewer District, an entity closely associated with Applicant, and is also for the purpose of irrigating Meadow Lake Golf Course.

These appropriations would be supplemental to the proposed appropriation, if it were granted, which means they would have overlapping places of use. On October 18, 1990, Applicant agreed to a condition identifying the supplement relationship between this proposed appropriation and Applicant's existing appropriations for irrigation of Meadow Lake Golf Course. (Department's file and Department's records)

16. It was the uncontested testimony of Peter Tracy that the proposed period of diversion is during the time of the year when flows are generally highest in Garnier Creek, and that Garnier Creek sometimes floods on Applicant's property during the proposed period of diversion. Garnier Creek flooded this year on Applicant's property during the proposed period of diversion. Trumbull Creek flooded this year on Objector Dick-Char Corporation's property, which is downstream from the confluence of

Garnier Creek and Trumbull Creek, during the proposed period of diversion.

Measurements of flows in the east branch of Garnier Creek have been made by Applicant and by staff of the Department's Kalispell Water Resources Regional Office. Applicant made an unsophisticated flow measurement on May 31, 1990, (which is outside the proposed period of diversion) and calculated a flow of approximately eight cubic feet per second or 3,590 gpm. Department staff measured the flow on May 7, 1991, (within the proposed period) and calculated a flow rate of 3.8 cubic feet per second or about 1705 gpm. (Department's file, Chubb-Sherod Exhibit 1, and testimony of Peter Tracy and Dick Sapa)

17. Objectors Joe and Judie Warner stated in their filed objection that there is not enough water flowing in Garnier Creek to allow 100 gpm to go to Applicant on the east fork of the creek and still have enough to satisfy their water rights on the west fork of the creek during the summer months. Warners have three rights on record with the Department to water from Garnier Creek: 76LJ-W142312-00, 76LJ-W142313-00, and 76LJ-W142314-00. These water rights are diverted from the west branch of Garnier Creek in the W $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1, Township 30 North, Range 21 West. The period of appropriation of two of these water rights includes the period of appropriation proposed by Applicant; however, Applicant's proposed period is March 15 through May 15, which is in the spring, not in the summer when Objectors Warner have

concerns about the availability of water. (Department's file and Department's records)

18. Objectors Len and Cindy Patterson are successors in interest to Objector Anna L. Monk. They have one right on record with the Department to water from Garnier Creek: 76LJ-W005518-00. This water right is for stock watering and is diverted in the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 12, Township 30 North, Range 21 West, which is from the main channel of Garnier Creek below the confluence of the east and west branches. The objection form filed by Anna Monk states that there is not enough water in mid-July through September of each year for watering stock. This period of low water is outside of Applicant's proposed period of appropriation and use. (Department's file and Department's records)

19. Objectors Ost and Loucks own Statements of Claim for Existing Water Rights to water in Garnier Creek below Applicant's proposed point of diversion and below the point where the two branches of the creek reconnect. Their diversion is the closest to Applicant's proposed point of diversion of all Objectors. Their water rights are: 76LJ-W007708-00 for 120 gpm with a year round period of diversion, and 76LJ-W213843-00 for one cubic foot per second with a period of diversion from May first through mid October of each year.

Garnier Creek goes dry in some years, including 1988, 1989, and 1990, in the area of these Objectors' property in July and August. This has killed the fish in the creek. They have not experienced a shortage of flows of water in Garnier Creek on

their property between March 15 and May 15. (Testimony of Carol Ost)

20. Objectors Sherod and Chubb have rights to appropriate water from Garnier Creek above Applicant's proposed point of diversion and above the point where the two branches of Garnier Creek divide. Neither of them have any opposition to Applicant's proposed appropriation as long as Applicant shows conclusively that water will not be able to seep into or out of the pit that would be the proposed pond. (Testimony of Loyal Chubb)

21. Objector Dick-Char Corporation owns Statements of Claim 76LJ-W147060-00 and 76LJ-W147061 for water from Trumbull Creek for irrigation and stock watering purposes respectively. The period of diversion and use for stock watering is January 1 through December 31 of each year, which includes Applicant's proposed period of use (March 15 through May 15); for irrigation it's May 15 through September 15, which overlaps Applicant's proposed period of use on one day, May 15.

Objector Dick-Char Corp. contends the water leaking into the pond is coming out of Garnier Creek and that that adversely impacts their water rights during the irrigation season when they have experienced insufficient flows in Garnier Creek to satisfy their water rights. At the time of the hearing they were only able to obtain about 200 gpm of their 1,450 gpm water rights.

Objector Dick-Char Corp. further contends that no permits to appropriate water should be granted to Applicant because

Applicant has shown a history of failing to install the required monitoring devices which leaves Applicant's systems unadministrable. The Department is in the process of determining whether Applicant is in substantial accord with the terms and conditions of its existing water rights and permits, which includes further action to bring Applicant into compliance or to begin revocation actions on their water rights. (Testimony of Dick Sapa and Chuck Brasen)

22. Lynn Venteicher testified that she and her husband had had an application for a stock water right denied and therefore it could not be proper to issue a new appropriation to Applicant. The Venteicher application (T060176-s76LJ) was for water from an unnamed tributary of Trumbull Creek to have been diverted in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, Township 31 North, Range 20 West, which is approximately five miles upstream from the confluence of Trumbull Creek and Garnier Creek. Public notice of the application identified it as being for irrigation and stock watering purposes with a period of appropriation from January 1 through December 31 of each year. The application received five objections, all of which referred to shortages of water on Trumbull Creek, some of the shortages having been below the confluence with Garnier Creek. The application was subsequently reduced to stock watering only, then withdrawn.

The application was not denied on the basis of a finding by the Department that it did not meet the statutory criteria for issuance of a permit, particularly a finding of adverse effect or

lack of unappropriated water in the source of supply. The application appears to have been withdrawn because of the opposition to it. Furthermore, there is nothing in the Department's file on T060176-s76LJ that shows specifically when the shortages on Trumbull Creek occurred, i.e., whether in the summer irrigation season or during the months of March, April, and May.

(Department's records and testimony of Lynn Venteicher)

23. There are no permits in existence for water from Garnier Creek where the planned use or development has not yet been completed. The Board of Natural Resources and Conservation has not reserved waters of Garnier Creek for future use. (Department's records and Testimony of Chuck Brasen)

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. Title 85, Chapter 2 (1989).

2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Hearing Examiner. See Findings of Fact 1, 4, and 5.

3. The Department must issue a Beneficial Water Use Permit if the applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1), MCA, are met:

- (a) there are unappropriated waters in the source of supply at the proposed point of diversion:
 - (i) at times when the water can be put to the use proposed by the applicant;

- (ii) in the amount the applicant seeks to appropriate; and
- (iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and
- (f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. To meet the substantial credible evidence standard in § 85-2-311(1), MCA, the applicant must submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the Department, the U.S. Geological Survey, or the U.S. Soil Conservation Service and other specific field studies, demonstrating that the criteria are met. Mont. Code Ann. § 85-2-311(4) (1989).

5. The proposed use of water, irrigation, is a beneficial use. Mont Code Ann. § 85-2-102(2)(a) (1989); see Findings of Fact 2, and 9.

6. Applicant excavated the pit prior to receiving a water use permit, but the pit was not dug solely as a water storage facility but also to obtain fill material for Applicant's driving range. See Findings of Fact 6 and 7. Although a person cannot legally begin construction of water impoundment facilities prior

to receiving a water use permit from the Department (Mont. Code Ann. § 85-2-302), this should not be interpreted so narrowly that a person must receive a water use permit prior to digging any pit that may or could be converted to use as an impoundment facility. In many cases such a conversion could not be anticipated. In other situations, of which the present matter may be one, a primary reason for digging the pit would be forestalled to the detriment of the developer.

Nevertheless water was diverted from Garnier Creek without a permit (see Finding of Fact 14), and after July 1, 1973, a person may not appropriate water except by applying for and receiving a permit from the Department. Mont. Code Ann. §§ 85-2-301(1) and 302 (1989). Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1989). The Department has no statutory authority to deny a permit on such grounds. See In re Application No. 52031-s76H by Frost.

7. Applicant proved by substantial credible evidence that Applicant has possessory interest in the property where the water is to be put to beneficial use. See Finding of Fact 10.

8. Applicant proved by substantial credible evidence that the proposed means of diversion, construction, and operation of the diversion works are adequate. See Findings of Fact 6, 11, 12, and 13. The true capacity of the existing pond, however, is not the six acre-feet originally anticipated and proposed by

Applicant, but is approximately three acre-feet. Finding of Fact 6. Therefore, the terms of the permit must be defined accordingly.

The law, § 85-2-311(1)(c), MCA, requires proof of the adequacy of the means of diversion. This has generally been interpreted to mean an applicant must show that the proposed system can be constructed and operated to divert and deliver the amount of water requested reasonably efficiently and without waste, and to allow control of the amount of water diverted such that it can be regulated in accordance with the system of priority on the source. See In re Application 69638-s76H by Unified Industries and 69659-s76H by City of Pinesdale. Objectors' allegation that a permit issued to this Applicant would be impossible to administer is not within the scope of determining whether Applicant has met the criterium requiring that operation of the diversion be adequate because the allegation does not involve questions of efficiency, prevention of waste, or lack of control devices. Objectors contention goes, rather, to the issue of enforcement because it raises questions about the potential for operation in excess of the limits of the permit. Other than proving the system is capable of controlling the amount of water it diverts, showing that a permit can be enforced is not a criterium for issuance of a permit. The potential to exceed the limits of a water right exists in many systems, especially when one considers period of use limitations on ditch systems. The system proposed by Applicant contains structures and components

which can control the operation of the system and which facilitate the application of monitoring devices and enforcement mechanisms.

Noncompliance with conditions placed on previously granted appropriations is not grounds for denial of a proposed appropriation. The statutes governing permits provide that the Department may modify or revoke a permit if the terms of the permit are not being followed. Mont. Code Ann. § 85-2-314 (1989). There is no statutory prohibition against further applications being accepted from or granted to such a permittee. But see Conclusion of Law 14, below.

There remains the objection to this Application that was most frequently and commonly expressed at the hearing: the construction of the pond is inadequate because it allows seepage of groundwater into it that has come from or is destined to reach Garnier Creek. There is in fact seepage. See Findings of Fact 7, 20, and 21. Therefore, Applicant needed to prove that the project when complete will be adequate in terms of preventing seepage so as to guarantee that only the controllable diversion structures are appropriating water. Applicant has provided that proof in its acceptance of the condition in Finding of Fact 7 that unequivocally requires Applicant to prevent seepage and provides a means of designing and constructing the pond that gives a high likelihood of success toward meeting that requirement, and in Applicant's representations under oath that it intends to prevent the flow of water into the pond through the

old rusted pipe (see Finding of Fact 8). Commitments such as have been given here by Applicant, specifically that the prevention of seepage must be professionally designed and reviewed, does serve to meet Applicant's burden of proof relative to § 85-2-311(1)(c), MCA. See In re Applications Nos. 69173-s41S and 68174-s41S by Floyd R. Blair; see also Conclusion of Law 12, below. Such a condition being accepted as ensuring that a proposed storage pit will meet the adequacy of means of diversion criterium is not unusual. Typically the actual effects of digging a pit into the shallow strata beneath the lands surface is not known until after permission to begin construction of a project has been granted. Thus, it is common for permits to be issued with the requirement that the water storage or ponding facility have a professionally designed and adequately installed liner to prevent seepage. See, e.g., In re Application 70511-s76LJ by Winter Sports, Inc.

9. Applicant has proved by substantial credible evidence that unappropriated waters are reasonably available in the source of supply at the proposed point of diversion in the amount and during the period Applicant seeks to appropriate. See Findings of Fact 16 and 19. The test for availability of unappropriated water consists of proving the physical presence of water at the intended point of diversion. See Mont. Code Ann. § 85-2-311(1)(a) (1989); In re Application No. 70511-s76LJ by Winter Sports, Inc.; In re Application No. 63997-g42M by Joseph F.

Crisafulli; Department of Natural Resources and Conservation,
Summary Report: Clark Fork Basin Water Use, November 9, 1990.

The record clearly shows that water shortages do occur in the Garnier Creek-Trumbull Creek drainage. The record also shows, however, that the shortages are outside of proposed period of appropriation and use. See Findings of Fact 17, 18, 19, and 21.

10. Applicant has proved by substantial credible evidence that the proposed appropriation will not adversely affect the water rights of prior appropriators. See Findings of Fact 16, 17, 18, 19, and 21. There will be no adverse effect due to the project's design, and operation so long as it can be adequately regulated. See In re Applications G15948-s76LJ and 17743-s76LJ by Harrington & Bibler, Inc.; see also In re Application 51938-s42M by Lester J. Ernster; Conclusion of Law 8, above. There is no evidence that the proposed amount of water diverted during the proposed period of appropriation and use would cause prior appropriators to continually call Applicant for water, or otherwise cause them to be unable to reasonably exercise their water rights. See Mont. Code Ann. § 85-2-401 (1989); see generally In re Application No. 60117-g76L by Houston.

11. Applicant has proved by substantial credible evidence that the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 23.

12. An Application for Beneficial Water Use Permit may be amended after public notice of the application if the amendments would not prejudice anyone, party or non-party, that is, those persons who received notice of the application as originally proposed but did not object would not alter their position due to the amendments. See In re Applications Nos. W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc. To cause prejudice, an amendment must suggest an increase in the burden on the source beyond that identified in the notification of the application as originally proposed. Such a suggestion of increased burden would be inherent in an amendment to expand the period of diversion, reduce return flows, increase the rate of diversion, increase the volume of water diverted, add an instream impoundment, or other such controlling parameters of the diversion. Conversely, there are many amendments that would not suggest an increase in the burden, such as a reduction in the place of use. See In re Application No. 50272-g42M by Joseph F. Crisafulli. Furthermore, the Department may modify an application if it prepares a statement of its opinion and the reasons therefore. Mont. Code Ann. § 85-2-310(2) (1989).

An expansion of the period of use of stored water does not imply an increase in the burden on the source beyond what was identified in the notices of this application because the impact on the source is confined to the initial diversion of water away from the natural channel into the storage pond. Therefore, the allowable period for irrigation of the golf course using water

stored in the pond may be amended from the erroneous period identified in the notices published and sent on this application to the true intent of Applicant. The period of use of stored water for irrigation shall be amended to April 1 through October 31. See Finding of Fact 3.

13. The Department has the authority to impose terms, conditions, restrictions, and limitations the Department considers necessary to satisfy the criteria in § 85-2-311(1), MCA. Mont. Code Ann. § 85-2-312(1) (1983). This permit will have a very limited period of diversion from Garnier Creek into storage, and the structures to be used to implement this appropriation are also operated for the same purpose on the same place of use under other appropriations owned by Applicant or other closely related entities. See Findings of Fact 2, 12, 13, and 15. To ensure that the limits of this appropriation are not exceeded, the terms of this permit must include close monitoring of this appropriation through measurements and record-keeping.

The pit, if not constructed to prevent seepage, will collect groundwater for which Applicant does not have a water right or permit. See Finding of Fact 7. For this reason and because Applicant has represented to all parties that it intends to ensure that the pond does not allow seepage, the permit must include the condition stated above in Finding of Fact 7.

Applicant does not have an appropriation for the water that is flowing in the old rusted pipe. Furthermore, Applicant has represented that it intends to eliminate the flow into the pond

from the old rusted pipe. See Finding of Fact 8. Therefore, it must be a condition of the permit that Applicant prevent flow into the pond through the old rusted pipe.

Identification of supplemental water rights ensures the total amount of water diverted to one purpose under all appropriations combined does not exceed the amount that can be beneficially used for that purpose. To do so would violate the criteria for issuance of the water use permits; therefore a condition identifying and limiting the use of supplemental water rights is proper. To identify all supplemental appropriations, the condition must also identify Permit P071015-g76LJ owned by Meadow Lake County Water and Sewer District. Furthermore, Applicant has agreed to a condition addressing supplemental rights. See Finding of Fact 15.

14. Objectors expressed substantial concerns relative to Applicant's compliance with conditions on previously granted appropriations. See Findings of Fact 5, 14, and 21; Conclusions of Law 6 and 8. If water is not being put to beneficial use in accordance with the terms, conditions, restrictions, and limitations contained of a permit, the Department can require a permittee to show cause why the permit should not be modified or revoked; and if the permittee fails to show sufficient cause, the Department can modify or revoke the permit. Mont. Code Ann. § 85-2-314 (1989). To notify Applicant and others who may have an interest in the administration of appropriations on Garnier Creek

and Trumbull Creek of this provision in the Montana Water Use Act, a statement of this provision shall be added to the permit.

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 74002-s76LJ is hereby granted to Meadow Lake Development Corporation to appropriate 100 gallons per minute up to 6 acre-feet per year of water from Garnier Creek for irrigation of 137 acres of golf course. The means of diversion shall be a headgate with ditch or pipeline tapping Garnier Creek in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, Township 30 North, Range 20 West, Flathead County, Montana. Water shall be stored in an off-source reservoir in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 6 with a capacity of 3 acre-feet. The proposed place of use is specifically described as 9 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, 10 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 14 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, 14 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, 26 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, 28 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, 13 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, and 23 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 6. The period of diversion from the source into the storage reservoir shall be March 15 through May 15 of each year. The period of use of water from storage for irrigation shall be April 1 through October 31 of each year. The priority date shall be 8:45 a.m. February 23, 1990.

A. The Permittee shall prevent the inflow of subsurface Garnier Creek water into the pond. The method of prevention shall be designed by a professional engineer. The plans for the method shall be presented to the Kalispell Water Resources

Regional Office of the Department of Natural Resources and Conservation for approval.

The plans must detail how the method recommended will prevent subsurface Garnier Creek flows into the pond adjacent to and upstream of the pond. The plans must be approved by the Kalispell Regional Office Manager prior to diversion of water into the pond from Garnier Creek.

B. Prior to diverting water from Garnier Creek into the pond, Permittee must permanently prevent or obstruct the flow of water into the pond through the existing rusted pipe. Prior to diversion of water into the pond from Garnier Creek, Permittee must obtain confirmation of compliance with this condition from the Kalispell Water Resources Regional Office.

C. Permittee shall install adequate flow metering devices on the diversion into the storage pond and on any diversion or outflow devices that take or release water from the pond in order to allow the flow rate and volume of water diverted and used or released to be recorded. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, used, or released including the period of time, and shall submit said records to the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation upon demand and by November 30 of each year.

D. This Permit is supplemental to Statement of Claim 76LJ-W131493-00, and Permits to Appropriate Water P8080-g76LJ, P26716-g76LJ, P26723-s76LJ, and P71015-g76LJ which means they have

overlapping places of use. The combined total volume diverted each year under these appropriations must not exceed the amount necessary for the permitted beneficial use.

E. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any prior appropriator.

F. If, at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right or that Permittee is not operating in substantial accordance with the terms and conditions of this Permit, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the Permit should not be modified or revoked. The Department may then modify or revoke the Permit to protect existing water rights or allow the permit to continue unchanged if the hearings officer determines that no existing water rights are being adversely affected or the Permittee has been operating in substantial accordance with the terms of the Permit.

G. Issuance of this permit shall not reduce the Permittee's liability for damages caused by exercise of this permit, nor does the Department, in issuing this permit, acknowledge any liability

for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

H. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

NOTICE


This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The defaulted Objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by the defaulted Objectors on other substantive issues.

Any exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

CASE # 74/002

Dated this 15th day of November, 1991.


John E. Stults, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 18th day of November, as follows:

Meadow Lake Development Corp.
1415 Tamarack Lane
Columbia Falls, MT 59912

Richard P. Walsh
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Columbia Falls, MT 59912

Joe Warner
Judie Warner
731 Halfmoon Road
Whitefish, MT 59937

Russell Warner
Jeanne Warner
810 Halfmoon Road
Whitefish, MT 59937

Van Sherod
2429 Second Avenue West
Seattle, WA 98119

Loyal Chubb
Patricia Chubb
231 Chubb Lane
Columbia Falls, MT 59912

Michael P. Davis
Margaret S. Davis
480 So. Hilltop Road
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Dick-Char Corporation
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George C. Butzlaff
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CASE # 74002